No. 78-441

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

ALLIED INTERNATIONAL PRODUCTS, LTD.,
Petitioner,

v.

TEXTRON INDUSTRIES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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The petitioner, Allied International Products, Ltd., a corporation of India, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in this case on May 19, 1978.

OPINIONS BELOW

The opinion of the Court of Appeals will not be reported. It is set forth in Appendix A, *infra*, pp. 1a-7a. The district court rendered two opinions, neither of which is reported. Its memorandum and order of June 13, 1977 is set forth in 1st Cir. App. 138-151.[1]. This was vacated, and a new memorandum and order was entered on June 20, 1977. This is set forth in 1st Cir. App. 167-180.

[1]References to the Appendix filed in the court below are designated "1st Cir. App." Ten copies of this Appendix have been filed with the Clerk of this Court.

JURISDICTION

The judgment of the court of appeals was entered on May 19, 1978. App. B, *infra*, p. 8a. On August 9, 1978, Mr. Justice Brennan entered an order extending the time for filing a petition for certiorari to and including September 18, 1978. App. C, *infra*, p. 9a.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether this Court should exercise its supervisory powers over the administration of justice in the federal courts and hold that, in the extraordinary circumstances of this case, it was an abuse of discretion for the district court to order the dismissal of the petitioner's case for procedural default.

2. Whether, in the extraordinary circumstances of this case, involving (1) a complete failure of representation by American counsel of a foreign client, and (2) a clearly misleading statement made to the district court by counsel for the defendant when the court was aware that no one was present to represent the plaintiff, an order of the district court dismissing the plaintiff's case with prejudice amounts to a taking of the plaintiff's property without due process of law contrary to the provisions of the Fifth Amendment.

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Rule 37(b)(2)(C) provides in pertinent part:

(b) Failure to Comply with Order.

(2) *Sanctions by Court in Which Action is Pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b) (6) or 31(a) to

testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

* * *

(c) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party . . .

Rule 37(d) provides that:

(d) *Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection.* If a party or an officer, director or managing agent of a party or a person designated under Rule 30(b) (6) or 31(a) to testify on behalf of a party fails . . . (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, . . . the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b) (2) of this rule . . .

Rule 41(b) provides that:

(b) *Involuntary Dismissal: Effect Thereof.* For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule . . . operates as an adjudication upon the merits.

STATEMENT[2]

This case began with a complaint filed on December 17, 1971, in the United States District Court for the Southern District of New York. 1st Cir. App. 2. The suit was for breach of contract, for a substantial amount. The complaint was filed near the end of the limitations period, but this is a period fixed by statute, and there is no contention that the complaint was not filed on time.

When the complaint was filed, Baker, Nelson, Williams & Mitchell, of New York City, regular counsel of the Goverment of India in New York, acted as counsel for the plaintiff. They had been recommended to the plaintiff by the Indian Embassy in Washington.[3] Mr.Robert E. Meshel of this firm was active in handling the case. This included a trip to India for consultation with the client.

During this period, settlement negotiations were conducted. The defendant sought and obtained repeated (at least ten) extensions of time for filing its answer. 1st Cir. App. 2. Thereafter, Baker, Nelson, Williams & Mitchell, by mutual consent, withdrew from the case. 1st Cir. App. 6. The reason for this withdrawal was that Mr. Meshel, the firm's litigation partner, left the firm on July 13, 1973. 1st Cir. App. 9. All charges of the firm were fully paid in accordance with the agreement between the parties. 1st Cir. App. 154.

Thereafter, the firm of Newman, Rich, Krinsley, Poses, Katz & Lillienstein, of New York City, was retained, through Norton I. Katz, Esq. The fee arrangement with this firm was made partially on a fixed, and partially on a contingent, basis. All fees were "subject to the approval of the Reserve Bank of India, without which no remittances could

[2]Only the basic facts are stated here. In order to avoid duplication, further facts are stated in the Reasons for Granting the Writ, below.

[3]A majority of the stock of the plaintiff is owned by the Government of India.

be made" by the plaintiff. 1st Cir. App. 131-135.

In July, 1974, pretrial hearings were held before Pollack, J. During this period, the defendants filed motions to dismiss, or to transfer the case to the District of Rhode Island. On October 15, 1974, the case was ordered to be transferred to that District. 1st Cir. App. 4.

In November, 1974, counsel for the defendant renewed its motion to dismiss for want of prosecution, and for lack of jurisdiction, and this motion was heard by the court (Day, J.) in Rhode Island on March 3, 1975. On May 29, 1975, the court granted the motion to dismiss with respect to certain of the individual defendants for want of proper service. The defendant's motion to dismiss for want of prosecution was denied. 1st Cir. App. 46-51.

Finally, on June 1, 1975, three and a half years after the complaint was filed, the defendant filed its answer. 1st Cir. App. 4.

On December 19, 1975, the plaintiff filed a motion to take the deposition of an officer of the defendant. The deposition was taken in January, 1976. It was not signed until June 11, 1976, and was finally filed by defendant's counsel on July 1, 1976, after a delay of five and a half months. 1st Cir. App. 4.

On December 6, 1976, the defendant filed interrogatories to the plaintiff.[4] On January 25, 1977, the defendant filed a further motion to dismiss. A hearing was held on this motion on March 7, 1977. 1st Cir. App. 60-68. On March 8, 1977, the court entered its order enlarging the time for the plaintiff to file a pretrial memorandum until March 17, 1977, and also extended the time for the plaintiff to file an-

[4]On October 14, 1976, the district court issued a pretrial circular or form letter, addressed to all counsel in pending cases. 1st Cir. App. 52. On November 11, 1976, the district court issued a pretrial order. 1st Cir. App. 54. This was the prelude to a bizarre series of events which are detailed in the Reasons for Granting the Writ, below.

swers to the defendant's interrogatories to March 17, 1977. 1st Cir. App. 69.

On March 22, 1977, the court (Pettine, J.) entered an order dismissing the case with prejudice for failure to comply with the pretrial order of the court, and for failure to prosecute. 1st Cir. App. 72.[5]

On April 7, 1977 a notice of appeal to the Court of Appeals for the First Circuit was filed. 1st Cir. App. 5, 73. On April 28, 1977, counsel for the plaintiff filed a motion to vacate the order of March 22, 1977, dismissing the case. 1st Cir. App. 75-105. On May 31, 1977, the First Circuit gave leave to Judge Pettine to hear and consider this motion. 1st Cir. App. 106. On June 13, 1977, Judge Pettine entered a memorandum and order denying the motion to vacate the order dismissing the case. 1st Cir. App. 138-151. On June 14, 1977, the plaintiff moved that the court vacate its order of June 13th. 1st Cir. App. 152-164. On June 20, 1977, the district court vacated its order of June 13, 1977, and entered a new order reaching the same result that it had reached in its order of June 13th, namely, dismissing the case for failure to prosecute. 1st Cir. App. 165-180.

An appeal from these orders was taken and was argued before the court of appeals on September 12, 1977. It was decided, more than eight months later, on May 19, 1978, in an opinion by Judge Wollenberg, of the Northern District of California, sitting by designation. App. A, pp. 1a-7a. The court of appeals affirmed the order of dismissal.

[5]As detailed below, the pretrial order of November 11, 1976, did not reach the plaintiff until March 8, 1977 (the day *after* the hearing before Judge Pettine). 1st Cir. App. 164. Immediately on receipt of the order, the plaintiff prepared answers to the interrorgatories and sent them to New York counsel on March 28, 1977. They were received by him on April 4, 1977. They were filed in the district court on April 28, 1977, along with the application to vacate the order of March 22, 1977.

REASONS FOR GRANTING THE WRIT

This is an extraordinary case. It raises serious questions with respect to practices in the administration of civil justice and delivery of legal services in this country, particularly as applied to a plaintiff from India, on the other side of the world, and from a different culture. It calls out for an exercise of this Court's supervisory authority over procedural matters in the federal courts.

1. The Proceedings in New York, and the First Motion to Dismiss.

The plaintiff had a claim in contract (see 1st Cir. App. 17-31) against an American company. On the recommendation of the Indian Embassy, the regular counsel for the Government of India was retained by plaintiff to handle the matter in New York. The counsel so retained filed a complaint in the United States District Court for the Southern District of New York on December 17, 1971. This was within the statutory limitation period.

Thereafter, there were negotiations for a settlement, during which *the defendant* filed ten successive motions to extend the time for filing its answer.

At this point, the plaintiff in India was advised that its counsel could no longer handle the case, since its trial counsel had left the firm. Consequently, the plaintiff made arrangements with another law firm in New York, and this firm was substituted for the earlier attorneys. The new firm, through its partner, Norman I. Katz, made a specific fee arrangement with the plaintiff. Appropriately, this was partly on a fixed basis, and partly on a contingent basis. 1st Cir. App. 131-133. This proposal was accepted by the petitioner "subject to the approval of the Reserve Bank of India, without which no remittance could be made by us." 1st Cir. App. 134. At about this time, the defendant filed a

motion to dismiss, and to transfer the case to the District of Rhode Island. There were hearings on the motions, and on October 15, 1974, the court in New York ordered that the case be transferred to the District of Rhode Island. 1st Cir. App. 2. This was two years and ten months after the complaint had been filed. The defendant still had not filed an answer.

The transfer may have been convenient for the defendant. It surely was not convenient for the plaintiff, ten thousand miles away in India, with counsel in New York. The transfer may have complied with American legal practices, but it is not easy for a litigant from another culture to understand.

The plaintiff, thwarted in its first effort to obtain counsel in the United States, had been forced to retain a second firm. That firm had appropriately made a continent fee arrangement, and their expectation of receiving payment above cost depended upon their continuing to handle the case. Accordingly, Mr. Katz agreed to continue with the case, though it had been transferred to Rhode Island. A *locum tenens* in Rhode Island was obtained in November of 1974, a Mr. Kennedy, but he appears to have held no direct responsibility for the plaintiff's interests. The relative unavailability of principal counsel in Rhode Island clearly contributed to the difficulties which ensued.

After the case was transferred to Rhode Island, in November 1974, the court there heard, on March 3, 1975, the motion to dismiss which had been filed in New York. On May 19, 1975, Judge Day granted the motion to dismiss as to certain individual defendants. However, he denied the motion to dismiss which was based on the ground of the plaintiff's lack of prosecution. Judge Day's opinion on this matter appears at 1st Cir. App. 46-51, and it is instructive. In part, Judge Day said (1st Cir. App. 50-51):

> While it is true . . . that the plaintiff has, at least in part, been responsible for the delayed prosecution for this action, it is also true that this action was filed within the pertinent statutory limitation period and that the defendants have contributed significantly to said delayed prosecution. Pursuant to the *defendants'* request, Judge Pollack granted the defendants what amounted to a two-and-one-half (2 1/2) year extension of time within which to file an answer.
>
> Where, as here, both parties contributed significantly to the delayed prosecution of this action, a motion seeking dismissal for lack of prosecution must be denied. [Emphasis in original.]

Thereafter, on June 17, 1975, exactly *three and a half years after the complaint was filed,* the defendant filed its answer on the merits. 1st Cir. App. 4. Although the defendant made motions to dismiss on procedural grounds, there never was a motion to dismiss on the merits.

On December 15, 1975, the plaintiff gave notice of the taking of a deposition. The deposition was taken in January, 1976. But it was never signed and filed by the defendant until July 1, 1976, five and a half months later.

2. The Motions to Compel, and the Second Motion to Dismiss, and the Surrounding Events.

After these preliminaries, in which both sides were found to be at fault, and substantial delays were clearly caused by the defendant, a strange and unfortunate series of events occurred in late 1976, and the early part of 1977.

On October 14, 1976, Judge Pettine sent out a form letter to all attorneys in pending civil cases, suggesting the

holding of settlement conferences, under the guidance of the court, if necessary. 1st Cir. App. 52. This letter was received by counsel for the plaintiff, and it was received by the company in New Delhi on October 30, 1976. 1st Cir. App. 166. Promptly thereafter, on November 4, 1976, the company sent a telex to the chairman of the defendant, asking for a renewal of settlement negotiations, in compliance with the request of Judge Pettine in his circular notice of October 14, 1976. 1st Cir. App. 116. The circular letter of October 14th is specifically referred to in this telex. No reply was received from the defendant.

On November 11, 1976, Judge Pettine entered a pretrial order in this case. 1st Cir. App. 54. The immediately following events are crucial in the evaluation of this case. The Court can best follow this by reading the few pages of exhibits which appear at 1st Cir. App. 116, 156-164. In considering these exhibits, the Court is asked to keep in mind that counsel for the plaintiff was in New York, and that the officers of the plaintiff were in New Delhi, ten thousand miles away. Moreover, and of great importance, the plaintiff, under the American system of representation in court, and in spite of the plaintiff's desire to comply with the directions of the district court, was completely dependent on its American lawyers. It was powerless to act except through, or with the help of, its counsel in New York.

After the issuance of the pretrial order on November 11, 1976, a letter was written on November 19, 1976, from Mr. Katz to Mr. D.N. Sinha, managing director of the plaintiff, in New Delhi. Mr. Katz stated that "We enclose a new Order made by the Court." 1st Cir. App. 156. This referred to the pretrial order of November 11, 1976, set out at 1st Cir. App. 54. Mr. Katz also advised the plaintiff that if fee arrangements were not straightened out, "it will be impossible for us to comply with the court's pre-trial order." For counsel, who remained counsel of record, to advise a client ten thousand miles away that counsel would not comply with

an order of the court is rather startling. This letter was received in New Delhi on November 29, 1976, and the plaintiff immediately (on November 30, 1976) sent a telex advising Mr. Katz that the pretrial order had not been enclosed with the letter. 1st Cir. App. 157.

Plaintiff sent another letter on December 8, 1976, to Mr. Katz, again advising him that the pretrial order had not been received. 1st Cir. App. 158. Mr. Katz acknowledged the letter on December 15, 1976, but still did not send the pretrial order to the plaintiff. Instead, he confused the pretrial order with the interrogatories, and sent a second copy of the interrogatories. 1st Cir. App. 159.[6] Persisting in its efforts to get a copy of the November 11, 1976 pretrial order, the plaintiff sent a telex on January 2, 1977 to Mr. Kennedy, who had entered an appearance for the plaintiff in the Rhode Island district court. 1st Cir. App. 4. This telex appears at 1st Cir. App. 117. In it Mr. Kennedy was advised that the plaintiff had not received the pretrial order. Mr. Kennedy did not send a copy of the order.

Regardless of who was at fault, the fact was, and was clearly known to the plaintiff's counsel, both in New York and in Rhode Island, that the plaintiff had not received a copy of the pretrial order, and thus did not know either the dates involved, or the directions of the court with respect to pretrial. The letters from Mr. Katz show that counsel's concern was with the payment of its fees rather than with effective representation of its client.

Finally, after three and a half months, on February 23, 1977, counsel in New York sent a copy of the order, and this was received by the plaintiff on *March 8, 1977* (1st Cir. App. 164), the day *after* the hearing before Judge Pettine

[6]This confusion was continued in a further letter of December 27, 1976. 1st Cir. App. 161. The plaintiff patiently sought to explain this in its telegram of January 5, 1977 (1st Cir. App. 162), and in a telegram sent on February 3, 1977. 1st Cir. App. 163.

referred to below. In all of its letters, counsel for the plaintiff in New York indicated no responsibility for complying with the pretrial order. During all of this period, the plaintiff received no effective representation in the District Court in Rhode Island, except for a motion for a further extension of time which was filed on the ground that there had been "an apparent breakdown of communications." 1st Cir. App. 59. Instead of representing the plaintiff, counsel in New York repeatedly advised the plaintiff that they were going to withdraw.[7] It is easy to say that the plaintiff should have obtained other counsel. But this is not so easy for a plaintiff ten thousand miles away, who cannot get information from counsel. Counsel also knew that any further appointment of counsel would again be subject to the approval of the Reserve Bank of India, which is a time-consuming process.

The result was that plaintiff did not file a pretrial memorandum or answers to interrogatories by January 24, 1977, the date specified in an order of the court made on January 11, 1977. 1st Cir. App. 55. Plaintiff's counsel then filed a motion for a further extension of time. 1st Cir. App. 59. And defendant's counsel filed a motion to compel answers to interrogatories (1st Cir. App. 56), and a motion to dismiss for failure to prosecute the case. 1st Cir. App. 58. No further action was taken on behalf of the plaintiff by plaintiff's counsel until a hearing was held on these motions

[7]A motion for leave to withdraw was prepared by counsel for the plaintiff on April 6, 1977, and a copy was sent to counsel for the defendant. Nevertheless, this motion was never filed in the court. It appears at 1st Cir. App. 118-119, as an exhibit to an affidavit filed by counsel for the *defendant*. See 1st Cir. App. 108-109, par. 7. By that time the damage had been done. It seems odd that this motion was communicated to counsel for the defendant, but was not filed in the court.

In June of 1977, plaintiff terminated the arrangement with counsel after they had been paid in full. See 1st Cir. App. 158. New counsel (Joseph V. Cavanagh, Esq.) has been retained in Rhode Island.

on March 7, 1977 — which was in fact one day *before* the plaintiff ever received in New Delhi the text of the court's pretrial order. There was a default during this period, described above, but it was the default of counsel, and *not of plaintiff*. *Cf.* the statement in the affidavit at 1st Cir. App. 128-129, par. 14. It is not to the credit of American law to put the penalty for the failure of American counsel to meet his responsibilities, and a final and severe penalty, on the alien plaintiff, located in a country half way around the world.

3. The March 7, 1977 Hearing.

A hearing was held on the motion to dismiss before Judge Pettine on March 7, 1977. The Court is asked to read the short transcript of this hearing. 1st Cir. App. 61-68. There are a number of things about it which are relevant and significant.

In the first place, counsel for the defendant stated that "the plaintiff changed lawyers, apparently from the record before this court, because the plaintiff did not pay his first lawyer." 1st Cir. App. 61. This is not true. There is no such record. The plaintiff's first lawyer was paid in full before its second lawyers were retained. His withdrawal was for a wholly different reason. This statement by *defendant's* counsel was not only erroneous, but it was obviously prejudicial.[8]

[8]Counsel for the defendant also charged the plaintiff with delay, saying: "The only thing plaintiff has done in this case is take the deposition of the Chairman" of Textron. 1st Cir. App. 62. But the plaintiff was under no obligation to engage in pretrial discovery. It was wholly free to try the case without extensive discovery, as was formerly common, if it wanted to do so. The fact was that the case was never at issue, until the defendant filed its answer. This was not done until June 11, 1975. 1st Cir. App. 4. Until then, all the delay was chargeable to the defendant, which could, at any time, have filed its answer and moved that the case be placed on the calendar for trial. Yet, before Judge Pettine, it was the defendant's counsel who said that the plaintiff's case should be dismissed for delay.

But there was another, and far more serious, misstatement made by counsel for the defendant. At 1st Cir. App. 62-63, counsel for the defendant specifically charged the plaintiff with a falsehood in making its statement that it had not received the pretrial order of the court. Counsel for the defendant referred to Judge Pettine's form letter of October 14, 1976, and then said (1st Cir. App. 63):

> . . . so very clearly back in November of 1976 they sent a Telex to Mr. Miller [chairman of Textron] referring to the court's pre-trial order, and then on January 28, 1977, they sent a Telex to Mr. Kennedy, saying they never received it. They're playing at ducks and straws.

However, it is very clear from the record that counsel for the defendant confused Judge Pettine's circular or form letter of October 14, 1976 (1st Cir. App. 52) with the pretrial order of November 11, 1976. 1st Cir. App. 54. The plaintiff did receive the circular letter of October 14,1976, which was couched in general terms; and appropriate action was immediately taken by the plaintiff by sending its telex to Mr. Miller. 1st Cir. App. 116. What the plaintiff did not receive was the order of November 11, 1976, which was the actual pretrial order, containing specific requirements and dates.

The statement by counsel for the defendant was undoubtedly unintentional. But it was an unfortunate and serious mistake on his part,[9] and disastrous for the plaintiff. It led Judge Pettine to find that the plaintiff made "*a patently false* claim that, as of January 28, 1977, it had never received the pre-trial order." 1st Cir. App. 147; emphasis supplied. This erroneous conclusion was the result of an erroneous statement made to the court by counsel for

[9]The error by defendant's counsel was in fact corrected by Mr. Kennedy (1st Cir. App. 65-66), but in a somewhat cryptic way. It is obvious from subsequent events that the correction made no impression on Judge Pettine.

the *defendant*, well-known to the judge, and it clearly had an important effect on Judge Pettine, as will appear more fully below. It had a doubly damaging effect for (a) it persuaded Judge Pettine that the plaintiff had lied when it said it did not receive the pretrial order, and (b) it deprived the plaintiff of the benefit which it might well have received if the court had understood that the plaintiff was seriously handicapped by the long delay in its receiving the pre-trial order of November 11, 1976.

In concluding his presentation, counsel for the defendant made a further reference to fees. He said: "It now appears that they have not paid Mr. Katz . . ." 1st Cir. App. 63.

Then Mr. Kennedy, of the Rhode Island Bar, appeared before Judge Pettine. His statement is explicit. He said (1st Cir. App. 64):

> First off, I'd like to state to the Court that I am here today representing Mr. Katz, and whatever interest he has in this matter. I have not been engaged by Allied International. Like Mr. Katz, I am not being paid.

Thus, it appears that *no one was representing the plaintiff at the hearing before Judge Pettine.* Mr. Kennedy was there, but Mr. Kennedy specifically stated that he was representing Mr. Katz, and not Allied International. Thus, though Mr. Katz was still the responsible counsel, he left Allied International entirely unrepresented, and there was *no one before the court* to present the case of Allied International with respect to the motion to dismiss, no one to correct adequately the clearly erroneous statement of defendant's counsel, confusing the October 14 circular letter and the November 11 order of the court, no one to explain the facts with respect to the fee situation, a subject interjected into the case by the defendant's attorney in a way that could hardly fail to be prejudicial. With this unwarranted charge against the plaintiff's veracity, and these

incorrect representations as to fees,[10] the motion to dismiss was submitted to Judge Pettine with *no one speaking for the plaintiff.*

On the following day, Judge Pettine entered an order requiring that a pretrial memorandum be filed by March 17, 1977, only ten days later, and requiring that the plaintiff answer the defendant's interrogatories by the same date. 1st Cir. App. 69-70. Counsel who was supposedly representing the plaintiff took no steps with respect to the pretrial order. In view of the distance involved, it was obviously impossible for the plaintiff to comply within ten days with the order with respect to the answers to interrogatories. Normally it takes ten days for an air mail letter mailed in Providence to be delivered in New Delhi, and longer if it has to go first to New York and then be sent on.

On March 22, 1977, without further hearing, or response from counsel, Judge Pettine entered an order to dismiss the action with prejudice for failure to comply with the order of March 8th. Judge Pettine was rightly concerned. But he focussed on the wrong target. The default was the default of plaintiff's counsel, compounded by the erroneous statements of defendant's counsel. In many circumstances a party is properly bound by the default of counsel. Under the special circumstances of this case, with a plaintiff on

[10]The fact was, as indicated, that the first lawyer was paid, in accordance with the agreement. 1st Cir. App. 154-156. Any difficulty with respect to payment of Mr. Katz arose because of regulations of the Reserve Bank of India with respect to foreign exchange. The Reserve Bank, contrary to U.S. custom (an instance of the two cultures), requires that bills be signed, and understandably requires detailed and itemized bills. These were not forthcoming from Mr. Katz. Mr. Katz has since been paid. 1st Cir. App. 155.

As far as the fee controversy was concerned, the plaintiff was *completely* unrepresented before the district court. Both counsel for the plaintiff *and* counsel for the defendant advised the court of fee difficulties (the defendant's counsel being informed by plaintiff's counsel), but there was no one to develop the underlying facts on behalf of the plaintiff.

the other side of the world, counsel not meeting its responsibilities, and plaintiff effectively unrepresented at a crucial hearing which would determine the fate of the case,[11] dropping the guillotine on plaintiff's case by dismissing it with prejudice is too severe a penalty.

4. The Two Orders in June 1977.

Following Judge Pettine's dismissal order, a notice of appeal was filed on behalf of the plaintiff by New York counsel on April 7, 1977. 1st Cir. App. 73. Thereafter, New York counsel filed in the district court a motion to vacate the order of dismissal, with affidavits from the plaintiff's managing director, and from Mr. Katz, attached. 1st Cir. App. 75-105. An order was then obtained from the court of appeals, giving the district court leave to consider the motion. 1st Cir. App. 106. In the meantime, counsel for the *defendant* had filed an affidavit in the district court, which compounded the previous inaccurate characterization of the facts, and *continued to mislead the court* by repeating the confusion between the circular or form letter of October 14, 1976, and the pretrial order of November 11, 1976. Plaintiff engaged new counsel in an effort to rescue its cause; and on June 8, 1977, counsel entered a notice of appearance in the district court.[12]

[11]These circumstances clearly distinguish this case from *National Hockey League v. Metropolitan Hockey Club,* 427 U.S. 639 (1976) (per curiam), where it was established not only that plaintiff was in bad faith, having expressly been directed to perform a specific act by a date certain, and then failing to do so, and neglecting to file any motion in this regard until five days later, and where plaintiff had been specifically warned that non-compliance would result in the imposition of sanctions under Fed. R. Civ. P. 37. Here, plaintiff acted in good faith, did not itself receive notice of any possible sanctions, and indeed, because of the actions of counsel, did not know how or when it was expected to act.

[12]As has been pointed out, the fees for all counsel employed by Allied International during the course of this proceeding have been paid.

On June 13, 1977, Judge Pettine entered a memorandum and order denying the motion to vacate the order dismissing the case with prejudice. The full text of this memorandum and order appears at 1st Cir. App. 138-151. It is significant, because it contains serious errors, induced by the defendant. Indeed, the court withdrew the memorandum and order of June 13, 1977, when these errors were brought to its attention.

The memorandum and order of June 13, 1977 was obviously influenced by the misstatements made by defendant's counsel at the hearing held on March 7, 1977, to which reference has already been made. For example, Judge Pettine states: "Plaintiff's then counsel, Baker, Nelson, Williams & Mitchell later withdrew, apparently because they were not paid." 1st Cir. App. 139. As already indicated this was not correct. Judge Pettine also made references to "renewed difficulties regarding fee arrangements," 1st Cir. App. 139, although he had no information as to the nature or underlying causes of those difficulties.

The court then recited the events of the period in late 1976 and early 1977, in regard to the pretrial order, and relating to defaults of plaintiff's counsel. The court then said (1st Cir. App. 141):

> Plaintiff claimed complete ignorance of the October 14 pre-trial order, which plaintiff's New York counsel advises had in fact been dispatched to plaintiff in New Delhi. This claim of "breakdown" and ignorance of the order is incredible on the face of the record, and it is rejected by the Court, which finds that plaintiff had knowledge of the pre-trial order, both actual and constructive. On November 4, 1976, plaintiff sent a telex from New Delhi to the Chairman of Textron, explicitly

referring to the pre-trial order and noting that it had received that Order on October 30.[3]

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[3]Compare the text of the January 28, 1977 telex from Allied International Products in New Delhi to plaintiff's Providence counsel, which reads:

> "WE ARE COMPLETELY IGNORANT ABOUT PRETRIAL COURTS ORDER WHICH MR. KATZ HASN'T SENT IN SPITE OUR REPEATED REQUEST SHALL BE GRATEFUL IF YOU COULD PLEASE SEND THEIR COPIES ACQUAINTING US WITH COURTS DIRECTIONS AND OBTAIN EIGHT TO TWELVE WEEKS TIME TO COMPLY ELSE THE CASE COULD BE JEOPARIZED DUE TO LACK OF ACTION BY OUR COUNSEL AND HONBLE COURT WILL BE PREJUDICED AGAINST YOU WHEREAS WE ARE COMPLETELY IGNORANT ABOUT COURTS AND DEFENDANT'S REQUIREMENTS STOP. COULD YOU PLEASE ALSO VISIT US FOR CONSULTATIONS AND FURTHER ACTION NICE TALKING TO MR. KENNEDY AWAITING COPIES COURTS ORDER STOP AS AGREED PRAY TIME TWELVE WEEKS TO COMPLY HONOURABLE COURTS DIRECTIONS."

with the text of the November 4, 1976 telex from the Secretary of Allied International Products in New Delhi to the Chairman of Textron, which reads:

> PLS REFER TO THE DIRECTIONS OF THE HON'BLE CHIEF JUDGE PROVIDENCE DISTRICT COURT DATED OCT. 14 RECEIVED OCT 30 AND TO YOUR PROPOSAL LAST PARA OF YOUR DEPOSITION MADE IN JANUARY AND FILED IN JULY 1976 REGARDING SETTLEMENT OF OUR CLAIMS. WE ARE WILLING FOR CONFERENCE WITH YOU AND IF YOURSELF ALSO AGREEABLE PLS FIX UP DATE PREFERABLY IN DELHI ELSE IN PROVIDENCE DURING NEXT MONTH AND ADVISE COURT AND OURSELVES ACCORDINGLY OTHERWISE PLS FIX UP EARLY DATE CONVENIENT MR. HAROLD KORNMAN

AND YOUR FURTHER DEPOSITIONS AND FURTHER DISCOVERIES.

WILL APPRECIATE YOUR REPLY ENABLING US NOTIFY THE COURT ACCORDINGLY.

The court found that the plaintiff's contention "is incredible on the face of the record" and that the plaintiff "had knowledge of the pretrial order, both actual and constructive." The court's conclusion is completely unwarranted. It is based on the confusion engendered by the *defendant's* counsel, when he failed to make a distinction between the circular or form letter of October 14 and the pretrial order of November 11, 1976.

The court then continued, in regard to plaintiff's communications with counsel in late 1976 and early 1977 (1st Cir. App. 141-142):

> The necessary conclusion is that no breakdown existed, although numerous other difficulties between plaintiff and its counsel may have.

This conclusion is likewise clearly erroneous, as examination of the material in 1st Cir. App. 156-164 plainly shows.

Further, Judge Pettine referred to the hearing on March 7, 1977, as one in which both parties had been represented by counsel, for he included the phrase "after hearing both parties by counsel" in his opinion. 1st Cir. App. 142. Yet, the record, recounted above, makes it plain that Allied International was not in any effective sense represented by counsel before Judge Pettine. Mr. Katz was not there. Mr. Kennedy had clearly stated that he was not representing Allied International. The vigor of his representation is clearly shown by his statement when Judge Pettine allowed ten days for a party in India to respond. He said: "I think that's generous, your Honor." 1st Cir. App. 67.

Next, Judge Pettine referred to the "exchange control regulations and bureaucratic difficulties with the Indian

Reserve Bank." 1st Cir. App. 144. He concluded (1st Cir. App. 145):

> This excuse is no excuse at all, and the Court is frankly appalled at the notion that members of the bar believe that deadlines imposed by Court order may pass silently, with neither compliance nor excuse, because cash is not yet in hand.

While the court's statement in regard to exchange and fee problems castigates counsel for failure to meet the court's requirements because of an interest in money, the result of the court's disposition of the case places the whole burden of the default by counsel on the plaintiff. This result obtained despite the court's reference in the concluding passages of the opinion to "failure to prosecute this case with fee squabbles and a thoroughly unprofessional variety of greed." 1st Cir. App. 147. This is a rather clear statement by the judge that the plaintiff was denied the effective assistance of counsel. Yet, instead of recognizing the desperate plight of the plaintiff and the unfairness of its situation, the court required the plaintiff to carry the ultimate burden and dismissed the case despite counsel's derelictions.[13]

Most seriously, the court concluded at the close of its memorandum (1st Cir. App. 147):

> Here, plaintiff has sought to excuse its conduct with a *patently false claim* that as of January 28, 1977, it had never received the pre-trial order. [Emphasis added.]

This is obviously a very grave charge, which says, without qualification, that the plaintiff lied to the court. Equally

[13] *Cf. Austin Theater, Inc. v. Warner Bros. Pictures, Inc.*, 22 F.R.D. 302 (S.D.N.Y. 1958); *Manesco v. Lambert*, 2 F.R.D. 163 (S.D.N.Y. 1941) (complaints not dismissed where neglect resulted from actions of counsel.)

obvious is the fact that this perception of plaintiff's actions could hardly have failed to affect Judge Pettine's exercise of discretion. Yet it is demonstrable that this statement is not true. It derives from confusion engendered *by the defendant's counsel* between the circular letter of October 14 and the pretrial order of November 11.

This whole scenario reflects more on the administration of civil justice in the United States than it does on any default by the plaintiff. This is why the case is so important.

5. The Final Memorandum and Order.

After the order dismissing the case was entered, a motion to vacate this order of June 13 was promptly filed, with accompanying affidavits. 1st Cir. App. 152-164. Judge Pettine did vacate the order, and on June 20, 1977 issued a new memorandum and order, which appears at 1st Cir. App. 165-180. This new memorandum and order of June 20 is much like the memorandum and order of June 13, *except that it has been sanitized.* Most of the material referred to above was deleted from the new memorandum, although the statement that plaintiff's first counsel withdrew "apparently because they were never paid" remains. 1st Cir. App. 168. The lengthy passage relating to the charge of lying, induced by defendant's counsel, which involved confusion between the circular letter of October 14 and the pretrial order of November 11 (quoted above at pp. 18-20), is omitted, together with the footnote. The statement that the plaintiff had made a "patently false claim that as of January 28, 1977 it had never received the pre-trial order" (1st Cir. App. 147) is omitted from the June 20 order.

Having made these changes, Judge Pettine nevertheless reinstated the order of dismissal. It is understandable that Judge Pettine was annoyed. There was a serious problem here. But Judge Pettine was exercising discretion, and discretion is a fragile thing. Here, in formulating the

reasons for the exercise of his discretion, Judge Pettine was clearly affected by an outright misstatement made by the defendant's counsel, which, however innocent, is shown to have misled the court by the court's own language in its memorandum of June 13. 1st Cir. App. 138-151. Likewise, the judge was clearly affected by a natural reaction to fee difficulties, but this reaction was in response to information which came to him from the counsel for the defendant, and although the judge *had been advised that there was in fact no one effectively representing the plaintiff before him.*

By June 20, 1977, Judge Pettine had been informed. But by that time, the die was cast, first by the decision in March 1977, and then by the decision of June 13, 1977. Even a court may not be able to put out of its mind a charge of lying and other erroneous or inappropriate information which has been firmly planted there by counsel well known to the court, in the absence of effective representation by the other side. *Cf. Bruton v. United States,* 391 U.S. 123 (1968).

One may have great sympathy with Judge Pettine. He was sorely tried. However, under the very special circumstances of this case, for him to place the entire burden on the plaintiff by dismissing the plaintiff's case with prejudice was an abuse of discretion. The court of appeals, with respect, never got below the surface in its consideration of this case.[14] It was in error when it failed to correct this abuse of discretion. The only recourse for a party in India which has had this disturbing encounter with American counsel and

[14]The court of appeals viewed the June 20, 1977 order of Judge Pettine as merely involving a correction of factual inaccuracies. App. A, p. 4a. It did not consider the effect of the inaccuracies on the trial court's ultimate disposition of the case. Nor did it consider the delays caused by defendant and cited in Judge Day's opinion of May 14, 1975.

The court of appeals was likewise clearly affected by the fee discussions which had been injected into the case by the defendant's counsel, with no opportunity for effective response by plaintiff. See App. 3a, *infra.*

the American system of administering civil justice is for this Court to exercise its supervisory power and to remand the case to the district court for immediate further proceedings on the merits.

The whole record shows something so pervasive, indeed so shockingly violative of fundamental principles, that it is more than a procedural error. As this Court has stated in regard to a district court's discretion to dismiss an action pursuant to Fed. R. Civ. P. 37, ". . . there are constitutional limits upon the power of courts . . . to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." *Societe Internationale v. Rogers*, 357 U.S. 197, 209 (1958).[15]

The discussion of the record set out above shows that the plaintiff has been denied the due process which is guaranteed by the Fifth Amendment to all persons, including aliens — due process in its basic sense of fair and adequate procedures. Here the *forms* of due process were maintained. There was a hearing, before an impartial judge, with both parties technically represented by counsel. But the *substance* of due process was wholly lacking:

> A. The plaintiff's principal lawyer, supposedly representing a client on the other side of the world, filed no papers on the merits of the motion to dismiss, and did not appear at all at the hearing. Though still counsel of record, he abandoned his client because of concern about his fees.[16]

[15] *See, e.g., Flaks v. Koegel* 504 F.2d 702, 712 (2d Cir. 1974). *See also Bon Air Hotel, Inc. v. Time, Inc.*, 376 F.2d 118, 121 (5th Cir. 1967), *cert. denied*, 343 U.S. 815 (1968) ("The dismissal of an action with prejudice is a drastic remedy and should be applied only in extreme circumstances.")

[16] The level of representation afforded Allied International by counsel is analogous to the ineffective assistance of counsel which this Court has found, under the Sixth Amendment, necessitates invalidation of a

> B. The *locum tenens* in Providence did appear, but expressly stated that he was "representing Mr. Katz" and that he had "not been engaged by Allied International." Thus the court knew that no one was appearing for the plaintiff — which hardly meets the due process conceptions underlying our adversary system.
>
> C. In this situation, with *no one* to correct the errors, counsel for the *defendant* made a wholly unwarranted charge to the court that the plaintiff had been guilty of falsehood, which induced the court to make the demonstrably erroneous finding that the plaintiff had made "a patently false claim." 1st Cir. App. 147. In addition, counsel made a number of erroneous, unwarranted, and irrelevant statements about fee payments, which clearly affected the trial court — and, indeed, the court of appeals.

The only fair conclusion from this, and from the whole record, is that the plaintiff did not in fact receive the sort of hearing and consideration from the court which underlie the conceptions of the due process of law guaranteed to all by the Fifth Amendment.

The plaintiff now has local counsel in Providence, who is prepared to go ahead with the case promptly. The plaintiff should have its day in court, and should not lose that opportunity because of the defaults of American counsel and the unwarranted impact of clearly erroneous statements made to the trial court by counsel for the defendant.

(footnote continued)
plea of guilty. Such representation transgresses the dictates of the Fifth Amendment's due process clause much as it transgresses the Sixth Amendment's guarantee of counsel in serious criminal cases.

This case need not take a substantial amount of this Court's time. The record is clear and is before the Court now. The Court can readily come to a conclusion without the need for oral argument. The Court should grant certiorari, and remand the case to the district court so that it may be heard, promptly, on the merits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 1978

APPENDIX

UNPUBLISHED OPINION

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 77-1202

ALLIED INTERNATIONAL PRODUCTS, LTD.,
Plaintiff-Appellant,

vs.

TEXTRON INDUSTRIES, INC.,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND
(Hon. Raymond J. Pettine, *U.S. District Judge)*

Before Campbell, *Circuit Judge*
Tuttle*, *Circuit Judge*
Wollenberg**, *District Judge*

Joseph V. Cavanagh, with whom *John C. Peterson* and *Higgins, Cavanagh & Cooney,* were on brief for appellant.
George Vetter, with whom *Benjamin A. White, III,* and *Hinckley, Allen, Salisbury & Parsons,* were on brief, for appellee.

May 19, 1978

*Of the Fifth Circuit, sitting by designation.
**Of the Northern District of California, sitting by designation.

WOLLENBERG, District Judge.

This appeal stems from a district court order dismissing an action with prejudice pursuant to Fed.R.Civ.P. 37(b)(2)(C)[1], for noncompliance with court orders; Red.R.Civ.P. 37(d)[2], for failing to serve answers to interrogatories; and Fed.R.Civ.P. 41(b)[3], for want of

[1]Rule 37(b)(2)(C) provides in pertinent part:

> (b) Failure to Comply with Order.
> (2) *Sanctions by Court in Which Action is Pending.*
> If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
> * * *
> (C) An order striking out pleading or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party . . .

[2]Rule 37(d) prescribes the following:

> (d) Failure of a Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails . . . (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, . . . the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among other it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule . . .

[3]Rule 41(b) provides that:

> (b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an ac-

prosecution. The alleged breach of contract which is the basis of this action occurred on December 22, 1965, when the defendant, Textron Industries, Inc. (Textron) unilaterally terminated a "collaboration agreement"[4] executed on June 6, 1964, with plaintiff, Allied International Products, Ltd. (Allied), a corporation located in and chartered by the Government of India. Allied filed a complaint in the District Court for the Southern District of New York against Textron and various individuals on December 17, 1971. What followed was repeated delays, in part due to non-payment by plaintiff of its attorneys.[5]

On August 16, 1974, Textron moved to dismiss, *inter alia* for want of prosecution and alternatively to transfer the ac-

(footnote continued)

> tion or of any claim against him . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule . . . operates as an adjudication upon the merits.

[4]By the terms of the agrement, Textron was to assist in the construction of an industrial plant in India by providing certain patented processes, experienced personnel, training of plaintiff's personnel and manufacturing machinery, as well as providing general assistance in the establishment and operation of the plant and subscription in the plaintiff's capital.

[5]Textron avers and the record indicates that the main reason for the two changes in counsel for Allied may have been that the fee arrangement with Allied required that payments be approved by the Reserve Bank of India by a lengthy and uncertain process. The district court judge rejected the assertion of plaintiff's counsel that the failure to proceed with discovery was a product of plaintiff's inability to advance sums for that purpose as "no excuse at all." We would go further and assert that any delays in procuring counsel or inaction of attorneys chosen by plaintiff to represent it in this action are chargeable to it. *See Affanato v. Merrill Brothers*, 547 F.2d 138, 141 (1st Cir. 1977). For the same reason, we find no merit in Allied's contention on appeal that it was an abuse of discretion for the court to dismiss the action for noncompliance with court orders when the plaintiff was not pesonally notified of the dates set as deadlines for compliance.

tion.[6] Pursuant to this motion, the case was transferred to the District of Rhode Island on November 4, 1974. Textron renewed its motions to dismiss on November 25, 1974, but the court found no lack of prosecution sufficient to warrant dismissal.[7] Textron filed a third motion to dismiss under Rules 37(b)(2)(C) and 41(b) on January 25, 1977, following plaintiff's failure to answer interrogatories or file a pre-trial statement as ordered. The motion to dismiss was granted by the district court in an order dismissing the case with prejudice. Plaintiff moved this Court to vacate the order of dismissal, and we reponded by granting the district court leave to consider this motion. Thereafter, the district court denied Allied's motion to vacate the dismissal, but on June 20, 1977, vacated that order only to correct factual inaccuracies and substituted a ruling again denying Allied's motion to vacate. This appeal is from the original March 22, 1977, order dismissing the action with prejudice and from the June 20 order denying plaintiff's motion to vacate the dismissal.

[6]Defendant also urged dismissal as against certain individual defendants for insufficiency of service of process, against all defendants for lack of personal jurisdiction and as against certain individual defendants for improper venue.

[7]The decision of May, 1975, denying the motion to dismiss for want of prosecution relied in large part on the fact that defendant had contributed significantly to the delayed prosecution of the action by obtaining what amounted to a two- and one-half-year extension of time within which to file an answer, noting that the case was not one where plaintiff was guilty of "an egregious and unreasonable lack of diligence of prosecution." Plaintiff now contends that this is the law of the case, exonerating plaintiff of culpability for failure to prosecute as of May, 1975. However, it is clear that a determination of lack of prosecution must be based on the entire procedural history of a case and that the court properly considered the conduct of plaintiff prior to the May, 1975, decision. *See, e.g., Richman v. General Motors Corp.*, 437 F.2d 196, 199 (1st Cir. 1971). It is equally clear that a denial of a motion to dismiss lacks fainality and, therefore, is the law of the case. *United States v. United States Smelting, Refining & Mining Co.*, 339 U.S. 186, 199 (1950).

On this record we cannot say that it was an abuse of discretion for the district court to dismiss the instant action. There were sufficient grounds to grant dismissal under either Rule 37 or Rule 41(b).

The court had discretionary authority under Rule 41(b) to dismiss for want of prosecution. Dismissal of this case also seems appropriate under the inherent power of the court to dismiss a case with prejudice as an exercise of "the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link v. Wabash Railroad Co.*, 370 U.S. 626, 630-31 (1962). That interest must be balanced against that of deciding cases on their merits. *See, e.g., Richman v. General Motors Corp.*, 437 F.2d 196, 199 (1st Cir. 1976). The dilatory tactics and inaction evidenced in the case at bar and noted by the district court, when added to the prejudice to the defendants necessarily caused by their being required to defend conduct which occurred more than twelve years ago, weighed heavily in favor of dismissal. Involuntary dismissals have been sustained as within the discretion of the court where there has been a dilatory history or noncompliance with timetables set by the court, both circumstances of which were present in this case. *See Link v. Wabash Railroad Co.*, 370 U.S. 626 (1962); *Zavala Santiago v. Gonzalez Rivera*, 553 F.2d 710 (1st Cir. 1977); *Pease v. Peters*, 550 F.2d 698 (1st Cir. 1977); *Asociacion de Empleados del Instituto de Cultura Puertoriquena v. Rodriguez Morales*, 538 F.2d 915 (1st Cir. 1976); *Spering v. Texas Butadiene & Chemical Corp.*, 434 F.2d 677 (3d Cir. 1970), *cert. denied*, 404 U.S. 854 (1971); *Pearson v. Dennison*, 353 F.2d 24 (9th Cir. 1965). Although the court was under no obligation to do so, it repeatedly granted extensions of time beyond deadlines set by the court or mandated by the Federal Rules.[8] We find no abuse of discretion

[8]Due dates ignored by plaintiff included the following: 1) the three-week target date for the close of discovery suggested on October 14,

in the court's finally terminating this action, after giving ample opportunities to Allied to proceed with its prosecution.

An alternative basis warranting dismissal under Rule 37 was plaintiff's noncompliance with the court order scheduling March 17, 1977, for the filing of Allied's answers to Textron's timely filed interrogatories and for the filing of a pre-trial memorandum. Plaintiff argues vehemently that its noncompliance with the deadline for answering the interrogatories was due to inability and not to wilfulness. We concede, as did the court below, that the extreme and sparingly used sanction of dismissal would be inappropriate if the sole reason for that action was the plaintiff's genuine inability to comply. *See Societe International Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958). It may be that the March 8 order did not give Allied sufficient time to meet the March 17 deadline, since it is alleged that the only person able to provide "meaningful" answers was then engaged in a campaign for election in a remote and inaccessible part of India. However, focus on that date is misplaced in light of the fact that the interrogatories were served on December 3, 1976, with answers required by January 3, 1977. Furthermore, such focus fails to take into consideration previous deadlines set by the court and ignored by plaintiff.[9] Moreover, we can find no justification in the record for the dereliction of counsel by neglecting to

(footnote continued)

1976; 2) the January 3 date for terminating discovery and the January 10 date for filing pre-trial memoranda set by the pre-trial order of November 11, 1976; 3) the November 29, 1976, deadline for requesting an extension of time for compliance with the November 11, 1976, order; 4) the January 3 deadline under Rule 33 for answering the defendant's interrogatories; 5) the January 24 extended time within which to file a pre-trial memorandum; and 6) the March 17 extension for filing answers to interrogatories and a pre-trial memorandum.

[9] *See* note 8 *supra*.

file the pre-trial memorandum, nor to answer or file the interrogatories until March 28, 1977, nor to advise the court prior to the deadline that compliance was not forthcoming. Allied showed total lack of respect for the court by its failure to seek extensions of time before time had run out or even to comply with extensions once granted.

The conduct of Allied and its counsel in our opinion constituted wilful noncompliance with the court order; its conduct was neither accidental nor involuntary. *Compare with Robison v. Transdamerica Insurance Co.*, 368 F.2d 37, 39 (10th Cir. 1966). The district court was justified in invoking the sanction of involuntary dismissal under Rule 37 for the purpose of penalizing plaintiff for its noncompliance with the court order and of deterring others from such conduct. *See National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643 (1976), *reh. denied*, 429 U.S. 874 (1976). Failure to perform an act by a date certain set by the court when compounded by waiting after that date to offer justification or excuse has resulted in dismissals under Rule 37 which have been sustained. *See, e.g., National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639; *Affanato v. Merrill Brothers*, 547 F.2d 138 (1st Cir. 1977). The dismissal of the instant action must also be sustained.

No new facts were raised by the motion to vacate which would change this finding, and therefore we sustain the order of June 20 denying that motion.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 77-1202

ALLIED INTERNATIONAL PRODUCTS, LTD.,
Plaintiff, Appellant,

v.

TEXTRON INDUSTRIES, INC., ET AL.,
Defendants, Appellees.

JUDGMENT

Entered May 19, 1978

This cause came on to be heard on appeal from the United States District Court for the District of Rhode Island, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the District Court is affirmed.

By the Court:
/s/ Dana H. Gallup
Clerk.

SUPREME COURT OF THE UNITED STATES

No. A-160

ALLIED INTERNATIONAL PRODUCTS, LTD., ETC.,
Petitioner,

v.

TEXTRON INDUSTRIES, INC., ETC.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 18, 1978.

/s/ William J. Brennan, Jr.
Associate Justice of the Supreme
Court of the United States

Dated this 9th
Day of August, 1978.

Supreme Court, U. S.
FILED
NOV 15 1978
MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-441.

ALLIED INTERNATIONAL PRODUCTS, LTD.,
PETITIONER,

v.

TEXTRON INDUSTRIES, INC.,
RESPONDENT.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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(401) 274-2000
Counsel for Respondent.

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

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In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-441.

ALLIED INTERNATIONAL PRODUCTS, LTD.,
PETITIONER,

v.

TEXTRON INDUSTRIES, INC.,
RESPONDENT.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Questions Presented.

1. Is certiorari warranted to review a discretionary ruling that is limited to one set of facts, affects no one beyond the two litigants, follows agreed-upon principles of law, and, in any event, is abundantly supported by the record?

2. Is certiorari warranted in such a case solely because one of the litigants is a foreign corporation?

3. Is certiorari warranted in such a case solely because on a motion defendant's counsel and the District Court first misread one of the plaintiff's telexes, but when plaintiff's counsel

immediately clarified the point before the District Court, when in addition the District Court heard plaintiff's motion to reargue based upon that point and issued a new opinion correcting the point, when the Court of Appeals likewise reviewed the precise point on substantially the same arguments as made here, and, in any event, when the point was one of minimal factual and no legal significance?

Chronological Statement of the Case.[1]

JUNE 6, 1964

Plaintiff Allied and defendant Textron signed a Collaboration Agreement.

DECEMBER 22, 1965

Textron terminated the Collaboration Agreement because of Allied's breaches and nonfulfillment of certain essential terms and conditions.

DECEMBER 17, 1971

Six years later[2] Allied filed a complaint in the United States District Court for the Southern District of New York (plaintiff's counsel: Baker, Nelson & Williams) against Textron and various individuals (defendants' counsel: Cravath, Swaine & Moore).

[1] In the interest of minimizing duplication and of pinpointing significant points in context, we will comment by footnote on certain events in the chronology.

[2] In these intervening six years, Allied was litigating in Indian courts against Indian government agencies over whether Allied had met certain preconditions to the collaboration project (1st Cir. App. 21-22).

FEBRUARY 8, 1972

Allied filed an amended complaint demanding specific performance of the 1964 Collaboration Agreement and $3,000,000 damages. Allied through its counsel, Robert E. Meshel of Baker, Nelson & Williams, made a settlement proposal. Textron made a counter-proposal. Allied rejected the counter-proposal (1st Cir. App. 13).

MAY 18, 1972

By letter Meshel asked the Honorable Milton Pollack, D.J., for a three-week delay before going forward with the case, in which to explore possible avenues of settlement (1st Cir. App. 40).

JUNE 16, 1972

Meshel again advised the court that the parties were exploring settlement "prior to the defendant submitting a formal answer" and of delay in transmitting a settlement proposal to Allied (1st Cir. App. 42).

NOVEMBER 20, 1972

Norman Itzkoff, with the Cravath firm, told Meshel that the defendants intended to move to transfer the action to the District of Rhode Island. Meshel asked Itzkoff to postpone making that motion to afford plaintiff's attorneys an opportunity to see whether the case could be settled and, if it could not be settled, whether Allied would agree to drop the individual defendants as parties. "Accordingly, *by consent of the parties*, the defendants' time *to move against or answer* the complaint was extended 'until 10 days after notice of the Court's action on a motion to transfer' by order of this Court

dated November 20, 1972" (Itzkoff affidavit of August 16, 1974, 1st Cir. App. 13) (emphasis supplied).[3]

JANUARY 29, 1973

Meshel by letter reported the status of the case to Judge Pollack, saying that since filing the complaint he had been conferring with defendants' attorneys about settlement, requesting additional delay to consult with his client, asking the court's indulgence for further time, and assuring Judge Pollack that in February 1973 he would "immediately proceed ahead [*sic*] with the litigation of this case" (1st Cir. App. 44).

MAY 31, 1973

Textron offered a second settlement proposal, to which it never received a response (1st Cir. App. 13-14).

JULY 6, 1973

Itzkoff received a telephone call from Meshel saying that Meshel was leaving Baker, Nelson & Williams and that *O. Taft Nelson of that firm was taking over the case; "that Baker, Nelson & Williams had never received a fee from plaintiff";*[4]

[3]Itzkoff submitted this affidavit in the District Court for the Southern District of New York. Allied has never contradicted or attacked these statements, and there is nothing in the record to indicate that postponement of defendants' answer came about other than at Allied's request and with the explicit approval of Judge Pollack.

[4]Allied states (petition, p. 3) that nothing in the record substantiates the statements of defendant's counsel (1st Cir. App. 61) and of the court (1st Cir. App. 139, 168) that Allied changed lawyers because, apparently from the record, the Baker firm had not been paid. Allied is wrong. These statements were based on Itzkoff's affidavit of August 16, 1974, which very much was in the record. Defendants repeatedly relied on it on the motions in New York and Rhode Island. But Allied never rebutted it. Not until Sinha's affidavit of June 19, 1977, submitted on Allied's motion to vacate the dismissal, does

and that a letter concerning settlement had been sent to plaintiff to which he expected a response within approximately two weeks. This telephone call was the last communication from plaintiff's first set of New York attorneys (1st Cir. App. 14) (emphasis added).

DECEMBER 10, 1973

Allied retained Rich, Krinsley, Poses, Katz & Lillienstein as substituted attorneys by retainer agreement consisting of three letters: (1) Norton I. Katz, Esq., letter to D. N. Sinha (1st Cir. App. 131-133), (2) D. N. Sinha letter to Norton I. Katz, Esq. (1st Cir. App. 134), and (3) Norton I. Katz, Esq., letter to Oriental Industries, U.S.A., Inc., signed by Harlan W. Graham of Oriental Industries, U.S.A., Inc. (1st Cir. App. 135), all dated December 10, 1973. In Sinha's letter to Katz forming plaintiff's acceptance of the retainer agreement, Sinha said: "I accept the same subject to the approval of the Reserve Bank of India, without which no remittance could be made by us. We expect that this approval would be granted to us within six (6) to eight (8) weeks. *In the event of our not getting the permission to pursue with [sic] this case within that time, we would request you to withdraw our claim and send us your bill*

Allied state it had paid the Baker firm (1st Cir. App. 154-155). The court did not have to credit this statement, especially in light of Allied's clear and protracted failure to pay its second counsel, Norton Katz, and its own admission that it needed Bank of India approval to get funds out of India and had not gotten that approval as of September 24, 1974, almost a year after the Baker firm withdrew (1st Cir. App. 30, 134). Nor did the court have to credit Sinha's further statement in his June 19, 1977 affidavit that the Baker firm withdrew because the trial attorney working on the case had left and they were not then staffed with trial counsel who could undertake the case. O. Taft Nelson of the Baker firm in his affidavit of December 12, 1973 (1st Cir. App. 8-9), states that Meshel, who left, was the litigating partner, but adds that he (Nelson) suggested Sinha get new counsel since he (Sinha) refused to accept the settlement negotiated and recommended by the Baker firm!

thereafter, which will be settled by us on its receipt"[5] (1st Cir. App. 134) (emphasis added).

DECEMBER 13, 1973

Newman, Rich, Krinsley, Poses, Katz & Lillienstein substituted as Allied's counsel by consent stipulation (1st Cir. App. 6-7). This stipulation was not served on defendants' counsel until July 12, 1974, seven months later (1st Cir. App. 14).

JULY, 1974

Allied's New York collaborator advanced funds enabling Allied's substituted counsel to proceed under the retainer agreement; the collaborator states that these funds were advanced for its, not Allied's account. As of April 6, 1977, Allied's counsel had received no funds from any source for services rendered after December 31, 1975 (1st Cir. App. 121, 124; 30).

JULY 12, 1974

Defendants' counsel learned for the first time that the Rich, Krinsley firm had become substituted counsel for plaintiff (in a letter advising that Judge Pollack had scheduled a pretrial conference). That was the first communication from either of plaintiff's counsel since July 6, 1973 (1st Cir. App. 14).

AUGUST 16, 1974

Defendants moved for an order (1) dismissing the action for want of prosecution, (2) dismissing the action as against certain individual defendants for insufficiency of service of process, (3) dismissing the action as against all defendants for lack of personal jurisdiction, (4) dismissing the action against certain individual defendants for improper venue, or, alternatively, (5) transferring the action to the District Court of Rhode Island (1st Cir. App. 10-11).

[5] Allied's petition does not mention this condition of the retainer agreement.

SEPTEMBER 27, 1974

D. N. Sinha executed an affidavit to support plaintiff's objection to defendants' motion to dismiss or transfer the case. Explaining plaintiff's failure to prosecute the case up to that time, he blamed the Reserve Bank of India for plaintiff's inaction, indicated imminent approval of funds, and promised diligent prosecution of the lawsuit (1st Cir. App. 30).

OCTOBER 15, 1974

Judge Pollack transferred the action to Rhode Island.

NOVEMBER 25, 1974

Defendants renewed their various motions to dismiss for want of prosecution, for insufficiency of service of process, for lack of personal jurisdiction, and for improper venue (1st Cir. App. 32). Textron's present counsel filed a notice of appearance.

NOVEMBER 26, 1974

Peter Lawson Kennedy, Esq., of Providence, R.I., filed a notice of appearance as local counsel for Allied.

MAY 16, 1975

Judge Edward W. Day dismissed the complaint as to individual defendants but denied defendant Textron's motion to dismiss for failure to prosecute.[6]

JUNE 17, 1975

Answer to amended complaint filed.

OCTOBER 1, 1975

The District Court (Day, J.) issued notice that it would call the case on October 21, 1975, which if answered ready would be placed on the continuous jury trial calendar to commence October 22, 1975.

OCTOBER 21, 1975

Allied did not call the case ready at the calendar call and it was passed.

DECEMBER 17, 1975

Allied's Providence counsel noticed the deposition of Textron's Chairman, G. William Miller.

[6]Judge Day misconceived the record when he said that for 2½ years Judge Pollack had enlarged the time to answer at defendants' request so that both parties contributed to the delay. As seen, Allied had asked defendants to withhold their motion to transfer to explore settlement, and had consented to an order enlarging the time to answer until after the decision on the transfer motion. *See* events of November 20, 1972, *supra* and footnote 3. If Allied had wanted to be relieved of its agreement that defendants need not answer, it could have so moved. The record shows that although Allied asked for the time to explore settlement, it did not respond to defendants' offers. For all defendants knew, Allied had abandoned its case. For Allied now to try to pin any delay much less the entire delay until answering on defendants (petition, p. 13, fn. 8) boils down to an argument that a defendant must keep alive a meritless law suit he has good reason to believe a plaintiff has abandoned.

JANUARY 20, 1976

Allied's New York counsel takes Miller's deposition, the only discovery by Allied.[7] (As of April 6, 1977, Allied had not paid its New York counsel for services in connection with that deposition.) (1st Cir. App. 124.)

AUGUST, 1976

Allied's New York counsel insisted that D. N. Sinha come to New York to discuss payment of fees (1st Cir. App. 124). Until that time, New York counsel had the impression from letters and conversations with plaintiff that the Reserve Bank of India had approved the retainer agreement (1st Cir. App. 122). It learned at this August 1976 meeting, for the first time, that the Reserve Bank of India had approved only a modified version of

[7]Allied makes several odd procedural points. It suggests Textron delayed the case by not filing G. William Miller's deposition until 5½ months after it was taken (petition, p. 9). Allied does not state when Miller received the deposition, but in any event Fed. R. Civ. P. 30(e), (f) provides that if a witness does not sign a deposition within 30 days after he receives it, the officer taking the deposition shall sign it and file it. (Contrary to Allied's suggestion, petition, p. 5, the parties do not file depositions.) Apparently sheepish about its sparse discovery (one deposition in five years), Allied comments that it was not required to conduct discovery and was wholly free to try its case without extensive discovery (petition, p. 13, fn. 8). Allied says this to this Court, but it said quite the opposite below — Allied told the District Court and its counsel that it wanted discovery (1st Cir. App. 97-98, 116, 161-162). Finally, Allied suggests Textron delayed the case by not filing its answer and moving that the case be placed on the trial calendar. As mentioned, if at any time Allied wished to have been relieved on the consent order, which it instigated, postponing defendants' time to answer until after determination of the motion to transfer, Allied could have so moved. And in Rhode Island cases go onto a calendar automatically, and proceed toward the top. When Judge Day called his calendar, Allied did not mark the case ready. When Judge Pettine began to ask for pretrial memoranda, Allied sought postponements. Plaintiff's attempt to metamorphose its colossal lack of interest in trying its case into delay by the defendants beggars credulity.

the retainer agreement (1st Cir. App. 125). Whereupon, New York counsel advised Sinha that Allied must pay its fees under the original retainer agreement or under the approved modification, or seek other counsel. Sinha left that meeting assuring New York counsel of payment, but as of April 6, 1977, New York counsel had received no payments (1st Cir. App. 124-125).

OCTOBER, 1976

Allied's New York counsel notified Allied that it must obtain other counsel (1st Cir. App. 126).

OCTOBER 14, 1976

The court offered to hold a settlement conference if the parties thought it might be effective and, if not, requested that "*plaintiff's counsel prepare and forward to me an order requiring close of discovery within three weeks from the date of this correspondence with pre-trial memoranda to be submitted one week thereafter.*" (1st Cir. App. 52.) (Emphasis in original.) Allied never submitted this pretrial order.

NOVEMBER 11, 1976

The District Court issued its standard preliminary pretrial order — ordering that pretrial discovery be closed by January 3, 1977, and that the parties submit pretrial memoranda by January 10, 1977, and stating that enlargement of any of these deadlines would not be granted unless requested by motion for good cause on or before November 29, 1976 (1st Cir. App. 54).

NOVEMBER 19, 1976

Allied's New York counsel notified Allied and Allied's New York collaborators of the pretrial order, by letter stating that it

enclosed the order and indicating a need for immediate action, given the ordered time schedule, to avoid "dismissal of the action" (1st Cir. App. 156, 126).[8]

DECEMBER 3, 1976

Textron served interrogatories on Allied (*see* 1st Cir. App. 56).

DECEMBER 15, 1976

Allied's New York counsel advised Allied and its collaborator of interrogatories, by letter stating it enclosed the interrogatories and advising of the need for immediate action by New York counsel or new counsel (1st Cir. App. 159, 126).

JANUARY 11, 1977

The District Court granted Allied's January 10, 1977, *ex parte* motion filed by its Providence counsel for an enlargement of time within which to file pretrial memoranda up to and including January 24, 1977 (1st Cir. App. 55).

JANUARY 19, 1977

Textron moved to compel answers to its interrogatories (1st Cir. App. 56).

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[8]There is no dispute that Allied's counsel in both New York and Rhode Island received this pretrial order. Allied's New York counsel says it sent the order to Allied in India and to Allied's collaborator in New York. Allied says it never received it. At one point, defendant's counsel misread one of Allied's telexes to be an admission that it had received this pretrial order in India. That telex actually referred to the October 14, 1976, letter from the District Court. As will be seen, counsel's mistake was brought to the court's attention, the court considered it and adhered to its decision.

JANUARY 24, 1977

Textron filed its pretrial memorandum in accordance with the enlargement granted on January 11, 1977.

JANUARY 25, 1977

Textron moved under Rule 41(b) to dismiss the action on the record of Allied's failure to prosecute and failure to comply with Rule 33 (1st Cir. App. 58).

JANUARY 28, 1977

Allied moved by its Providence counsel for an additional extension of twelve weeks within which to file its pretrial memorandum (1st Cir. App. 59).

FEBRUARY 3, 1977

Textron filed an objection to Allied's motion for further enlargement.

MARCH 7, 1977

A hearing was held before the Honorable Raymond J. Pettine on Allied's motion for a second enlargement for filing of its pretrial memorandum, Textron's objection thereto, and Textron's motions to dismiss for failure to prosecute and to compel answers to interrogatories. Allied's Providence counsel represented Allied at the hearing (1st Cir. App. 61-68).[9]

MARCH 8, 1977

The court entered its order requiring Allied to file a meaningful pretrial memorandum and meaningful answers to Tex-

[9] Allied focuses its complaints on this hearing. We will deal with them in the argument.

tron's interrogatories by March 17, 1977, and holding Textron's motion to dismiss in abeyance for consideration after March 17, 1977 (1st Cir. App. 69).

MARCH 17, 1977

Deadline date. Allied failed to file its pretrial memorandum and answers to interrogatories. (The docket entries show that neither of these documents were ever filed.)

MARCH 22, 1977

An order was entered dismissing the action with prejudice (1st Cir. App. 72).

APRIL 4, 1977

Allied's New York counsel received a night letter from Allied threatening them with liability for counsel's noncompliance with the court's order although counsel had "all material facts" with them. New York counsel later received a telegram dated April 5, 1977, addressed to Allied's Rhode Island counsel, saying that its New York lawyers had not complied with the court's November pretrial order and threatening "serious consequences" to the New York firm (1st Cir. App. 136-137).

APRIL 4, 1977

Allied filed a notice of appeal from the March 22, 1977, dismissal order. The appeal was filed by Allied's New York counsel (1st Cir. App. 73).

APRIL 7, 1977

Textron's counsel received motions of Allied's New York Counsel for an order (1) permitting them to withdraw as attorneys for plaintiff, (2) directing Allied to obtain substitute

counsel, and (3) granting Allied reargument. The motions were accompanied by the affidavit of Norton I. Katz, Esq., dated April 6, 1977 (1st Cir. App. 118-137).

APRIL 28, 1977

Allied moved in District Court to vacate the March 22, 1977, dismissal order. This motion was filed by both New York and Providence counsel (1st Cir. App. 75). The motion was accompanied by an affidavit of D. N. Sinha, dated April 27, 1977 (1st Cir. App. 77-98), stating, *inter alia*, that he was the "only one" with sufficient knowledge to answer defendant's interrogatories, that plaintiff could not comply with the court's order because he was engaged in a campaign for parliament that ended on March 17, 1977, and that, finally, he had just secured tentative approval from the Reserve Bank of India for transfer of funds to pay Allied's counsel, settling all past bills and advancing payment for services through June 30, 1977 (1st Cir. App. 94-95). The motion was also accompanied by an affidavit dated April 27, 1978, of Norton Katz, Allied's New York counsel, stating, *inter alia*, that "none of the payments which were to be received from the plaintiff had been made until today," and Sinha "has requested that we remain as counsel for the plaintiff and we have undertaken to do so" (1st Cir. App. 103-104).

APRIL 29, 1977

Allied's Providence counsel filed a request for a speedy hearing on its motion to vacate.

MAY 6, 1977

Textron filed in District Court its objection on jurisdictional grounds to plaintiff's motion to vacate.

MAY 9, 1977

Allied filed a motion in the Court of Appeals to withdraw its appeal. This motion was filed by Allied's Providence counsel.

MAY 10, 1977

Textron filed in the Court of Appeals its objection to plaintiff's motion to vacate.

MAY 17, 1977

Allied filed a motion for remand and alternative relief. This motion was filed by both New York counsel, Katz, and Providence counsel, Kennedy.

MAY 31, 1977

The Court of Appeals granted the District Court leave to consider Allied's motion to vacate (1st Cir. App. 106).

JUNE 8, 1977

Allied's third set of counsel (Joseph Cavanagh of Providence, R.I.) filed a notice of appearance, and advised the District Court by letter of June 9, 1977, about an "agreement" between Allied and its New York counsel terminating the latter's services (Resp. App. 1a).

JUNE 13, 1977

Allied's former New York counsel advised the District Court by letter that Allied's termination of its services was unilateral (Resp. App. 2a).[10]

[10] Less than two months before, Sinha had paid Katz for the first time, and asked him to continue as counsel. *See* events of April 28, 1977.

JUNE 13, 1977

The District Court entered its first memorandum and order denying Allied's motion to vacate dismissal (1st Cir. App. 138-151).

JUNE 14, 1977

Allied moved to vacate the District Court order of June 13, 1977. This motion again brought up the two-telex mistake of defendant's counsel and was accompanied by another affidavit of D. N. Sinha (1st Cir. App. 153-155), saying, *inter alia*, that delay in payment of Allied's New York attorneys was due solely to *their* failures, and attaching certain correspondence between plaintiff and its New York counsel including a January 5, 1977, telegram from Sinha to Allied's New York counsel saying with respect to Allied's answers to Textron's interrogatories:

> "FULL FACTS ALREADY WITH YOU. PLEASE SEND YOUR DRAFT REPLY TO FURNISH ANY FURTHER INFORMATION NECESSARY." (1st Cir. App. 162; *see also*, 136.)[11]

JUNE 20, 1977

The District Court entered a memorandum and order vacating its June 13, 1977, order, and substituting the same as

[11] Compare this statement with Sinha's statement in his affidavit of April 27, 1977 (1st Cir. App. 94-95), that he was the only one with sufficient knowledge to answer defendants' interrogatories! In its petition Allied stated, p. 6, fn. 5, that Allied filed answers to defendants' interrogatories on April 28, 1977, along with its motion to vacate the dismissal order of March 22, 1977. The court docket does not indicate that these answers to interrogatories were filed (1st Cir. App. 5). More revealing yet, in Sinha's affidavit of April 27, 1977, submitted on Allied's motion to vacate, he asks for further time "within which to have its counsel answer defendants' interrogatories . . ."! (1st Cir. App. 96-97.)

its ruling denying Allied's April 28, 1977, motion to vacate (1st Cir. App. 165-180).

MAY 19, 1978

The Court of Appeals for the First Circuit issued its opinion on Allied's appeal. The opinion noted six deadlines included among those ignyred by Allied, observed that any delays in procuring counsel or inaction of attorneys are chargeable to Allied, and found sufficient grounds for dismissal under either Rule 37 or Rule 41(b).

Reasons for Denying the Writ.

The petitioner asks this court to review a discretionary ruling by a district judge that has already been reviewed and affirmed by three judges of the Court of Appeals. Far from there being a conflict in the circuits, the law applied by the four judges below is well-settled and accepted as integral to the orderly administration of justice. To avoid this hard fact, the petitioner picks and chooses from the record, and occasionally goes beyond it, to insinuate impropriety by the district judge and others and to suggest the case has importance because petitioner is a foreign corporation. Based on this, the petitioner would have this court substitute its judgment on a matter of discretion for that of the District Court and the Court of Appeals, in the guise of exercising its supervisory power over the lower courts in the federal system. The record, however, cries for the summary denial of the petition.

I. Where a Case is One of a Kind, Where the Result Goes No Further than the Immediate Parties, Where there is No Conflict in the Circuits on the Law, Where Indeed the Law is So Well Settled and Accepted that Even to Grant Certiorari Would be Unsettling — in Such a Case the Court Should Deny Certiorari Out of Hand.

The District Court based its decision on the entire record in the case. The Court of Appeals based its affirmance on the entire record. Both courts applied to that record well-established principles of law about which there is no dispute.

Delays and inaction by counsel chosen by Allied are chargeable to Allied. *See, e.g., Affanato* v. *Merrill Brothers*, 547 F. 2d 138, 141 (1st Cir. 1977). Denial of Textron's first motion to dismiss lacked finality and was not law of the case. *See, e.g., United States* v. *United States Smelting, Refining & Mining Co.*, 339 U.S. 186, 199 (1950). A determination of lack of prosecution must be based on the entire procedural history of a case. *See, e.g., Richman* v. *General Motors Corp.*, 437 F. 2d 196, 199 (1st Cir. 1971). The District Court had discretion to dismiss under its inherent power "to manage [its] own affairs so as to achieve the orderly and expeditious disposition of cases." *See, e.g., Link* v. *Wabash Railroad Co.*, 370 U.S. 626, 630-631 (1962).

And what was the record to which the courts applied these principles of law? Allied says it is an extraordinary one. We say it is a fantastic one — five years of inaction by Allied punctuated only by its excuses and promises and by its ability not only to shuck its old lawyers in order to blame them for its own misconduct but also to inveigle its new lawyers into doing this.[18]

[18] Is it coincidence that Allied is on its fifth set of counsel?

What is the upshot? When a court applies settled law to unique facts, the decision does not reach beyond the lawsuit. For this court to involve itself in this case would have no precedential effect. No one, not even Allied, disputes the principles of law.

Furthermore, discretion, and only discretion, is involved here. For this court to review that discretion would be for it merely to adjust a dispute between the parties and to substitute its judgment for that of the District Court in the management of that court's docket. Indeed, for this court on this record even to grant certiorari would signal all District Courts to go easy on sanctions in their attempts to move cases on their docket. This would be a giant step backwards.

II. Allied's Very Attempts to Insinuate Impropriety, to Inflate the Importance of the Case, and to Blame Everybody but Itself Prove the Hollowness of its Position.

1.

Allied tried to blame defendants for the delay and lack of prosecution. The record demolishes this argument. We have already commented on the more outlandish points Allied makes in this respect. We will not repeat them except to say that Allied instigated the order postponing defendants' obligation to answer and it could at any time have moved to have been relieved from the order.

Allied pleads inconvenience because the case was transferred to Providence, thousands of miles from India and with Allied's counsel in New York. This, it says, is not easy for a litigant from another culture to understand. What on earth culture has to do with this we do not know. As another plea

for sympathy insinuating a naivete requiring special treatment and protection, it can be shrugged off. Thousands of litigants and lawyers litigate many miles away all of the time in this age of fast travel and virtually instant communication — and this includes New York lawyers in Rhode Island. Besides, Allied was an old hand at major litigation (1st Cir. App. 21-22).[13]

Of a piece with this argument, Allied tries to make the case out as delicate, touching on international relations. Allied claims to be government-owned and hints that its interests are that of the government of India (petition, p. 4, fn. 3; p. 7). There is nothing in the record about this at all. In fact, up to this point Allied has made the government of India a scapegoat. Allied had railed perennially about the failure of the Reserve Bank of India to free up funds so Allied could pay its counsel and prosecute the case (1st Cir. App. 30, 87-98, 102-105). And, very odd for a government-owned company, Allied had to sue Indian governmental agencies to get its stock registered (1st Cir. App. 83-84). But, as they say about a foolish consistency, Allied has raised the point. We submit, though, that this court will not credit the contention that for reasons of foreign policy a different set of rules apply to foreign corporations than to American litigants.

2.

In this court, as in the courts below, Allied blames its counsel for the events leading to the dismissal. By law, of course, Allied is held responsible for the acts of counsel.

[13] Sinha managed to get funds to come to the United States in April 1977 and either to stay until or to return again in June 1977 (1st Cir. App. 77-98, 153-155); and to come in September 1974 (1st Cir. App. 17-31). These occasions involved the motions to transfer and to dismiss and to vacate, proving he could get here and get funds when he wanted to.

Here, however, it is only Allied's naked say-so on a number of key points that in fact would fix blame on counsel. For example, Allied says it never got the pretrial order. Allied's counsel says he sent it to Allied and Allied's collaborator. The court had no duty to believe Sinha over Katz.

The fundamental flaw in Allied's position all along has been and is its insistence that what it says must be accepted as true, gospel in the literal sense of good news for Allied. Courts, however, have a duty to look at an entire record, weigh it, and draw inferences and conclusions. The record here abundantly supports the inferences and conclusions of the courts below.

3.

Looking at the record, Allied's insistence that defense counsel misstated the fee situation is plainly wrong. Allied says defense counsel had no basis for the statement at the March 7, 1977, hearing that Allied's first counsel withdrew apparently because it had not been paid (petition, p. 13) and cites Sinha's June 19, 1977, affidavit that Allied's first counsel had been paid in full. But, as pointed out before, there was the Itzkoff affidavit in the record (1st Cir. App. 14) to support the statement and the court's finding. To boot, the affidavit had never been rebutted though used on two previous motions, on one of which at least Sinha had submitted a subsequent affidavit. And at the hearing Allied's Providence counsel said that he and Allied's New York counsel had not been paid (1st Cir. App. 64), which Katz's affidavit of April 6, 1977, bears out (1st Cir. App. 123-125). Sinha's affidavit of June 19, 1977, whether to be credited or not, hardly could have helped the court on March 7, 1977, three months before.

4.

Allied's main argument hangs on defense counsel's admitted mistake at the March 7, 1977, hearing about which notice Allied said it had received. Kennedy, Allied's local counsel, clarified the point at the hearing (1st Cir. App. 65). He also said he represented Allied's New York counsel, Katz, and represented Allied at the hearing "for the purpose of this motion . . ." (1st Cir. App. 64).

Allied now argues that no one represented it at the hearing and that this deprived it of the due process of law. There are several answers to this.

Whatever Kennedy said, he represented Allied at the hearing and acted for it both before and after the March 7, 1977, hearing.[14] Allied does not repudiate Kennedy's other efforts. It cannot deny that he spoke up at the hearing on the crucial points. On this record Allied scarcely can say it was not represented at the hearing, much less escalate Kennedy's few words into a due process violation.

The hard fact for Allied, however, is that the court did hear Allied at length about the mistake on the notices, and about fees. The court included the mistake about the notices in its opinion on Allied's first motion to vacate. On getting the opinion, Allied's new and fourth counsel immediately filed another motion to vacate, focusing on this very mistake and the fee situation (1st Cir. App. 152-164). The court heard counsel, considered the motion, acknowledged the missake *and issued a new opinion correcting it and reaffirming the dismissal* (1st Cir. App. 167-180).

[14] He had filed a notice of appearance for Allied (1st Cir. App. 4), he had noticed G. William Miller's deposition, he had obtained an *ex parte* enlargement of time (1st Cir. App. 55), and he had moved for a further enlargement which was one of the motions heard on March 7, 1977 (1st Cir. App. 59). Subsequently, he and Allied's New York counsel moved to vacate the dismissal (1st Cir. App. 75); he requested a speedy hearing on the motion, he moved in the Court of Appeals to withdraw Allied's appeal, and he and Allied's New York counsel were to move to reargue the dismissal (1st Cir. App. 118-119).

How can Allied transmogrify the indisputable fact that it was heard on this factual point into a due process argument that it was not heard?

Recognizing that it cannot, Allied resorts to the last refuge of disgruntled suitors — the argument *ad hominum*. Piercing through the artful verbiage in its petition, at bottom Allied charges that Judge Pettine could not be objective in reconsidering his decision because defendant's counsel was "well known" to the court. Allied says that "[e]ven a court may not [have been] able to put out of its mind a charge of lying and other erroneous or inappropriate information which [had] been firmly implanted there by counsel well known to the court . . ." (petition, p. 23).

Just what is Allied insinuating? Nothing less than that Judge Pettine decided the case out of partiality to defendant's counsel!

Allied outdoes even itself in this argument. It goes outside the record to call defendant's counsel "well known," but while outside the record does not mention that Mr. Cavanagh is one of the leading and most respected trial lawyers in the state. And it studiously omits the court's expression of respect for Mr. Kennedy (1st Cir. App. 66).

It neglects to state that defendant's counsel admitted the mistake to the court (1st Cir. App. 165), but states instead that despite counsel's admission the court could not put out of its mind what defendant's counsel had previously said.

It yokes together Allied's failure to pay fees with the conceded mistake on notice, hoping by the juxtaposition that the admitted mistake on the latter would support its argument of mistake on the former. Allied never refers to the cornucopia of facts in the record about Allied's failure to pay fees.

Rather, it relies solely on Sinha's belated, self-serving assertion that fees had been paid (significantly, Sinha does not say when). In short, Allied totally ignores that the record abundantly supports what defendant's counsel and the court said about fees. In any event, the court did not have to accept what Sinha said. We have made these points before. We make them again, because for Allied to use them to support its charge of partiality is especially invidious.[15]

Of course the Court of Appeals considered all of this. But, according to Allied, the Court of Appeals "never got below the surface in its consideration of this case" (petition, p. 23). And so, the Court of Appeals also joins the list of those responsible for Allied's woes.

III. The Lower Courts were Right. Given Allied's Five-Year Record of Nothing but Excuses and Promises and Given the Extreme Prejudice to Textron to Try a Case with Fourteen-Year-Old Facts, the Lower Courts had No Alternative but to Dismiss.

The record speaks for itself about Allied's conduct. The chronology lays it out in summary form.

[15]Allied chose its New York counsel. Allied agreed with its New York counsel that it would withdraw its claim altogether if the Reserve Bank of India did not approve their fee agreement within weeks after December 10, 1973 (1st Cir. App. 134). Allied did not expect counsel to proceed without payment. Allied's Sinha knew in August 1976 — long before the District Court issued any pretrial notice or order — that its New York counsel would no longer willingly represent Allied if amounts due were not paid (1st Cir. App. 102). Allied knew urgent action was required, and knew its case was in jeopardy if it did not obtain other counsel (1st Cir. App. 103, 156-164). At one moment Allied says Sinha was the only one with sufficient knowledge to complete answers to interrogatories and pretrial memoranda (1st Cir. App. 95). Yet, at others, Allied says its New York counsel had "full facts" and "all material facts" available to them (1st Cir. App. 136, 162).

In New York, Allied conducted no discovery, filed no papers, opened settlement negotiations but did not respond to defendants' settlement offers, requested that defendants postpone their motion to transfer, prayed for Judge Pollack's indulgence in tolerating Allied's delays, assured immediate prosecution, obtained substitute counsel but did not tell defendants and, when faced with dismissal when Judge Pollack resurrected the case from limbo, submitted Sinha's affidavit blaming others for the inaction but promising diligent prosecution.

This summarizes virtually three years of Allied's activity in the case.

In Rhode Island, Allied took Miller's deposition, ignored the court's direction to prepare a pretrial order, ignored the court's own pretrial order, obtained *ex parte* a two-week enlargement to file its pretrial memorandum, failed to file its pretrial memorandum, failed to answer Textron's interrogatories, and, when faced with Textron's motion to dismiss, moved for a 12-week enlargement.

This summarizes five years of Allied's activity in the case.

Allied did nothing, but it blames everyone else — Textron, Miller, Textron's counsel, its own New York counsel, its own Rhode Island counsel, the Reserve Bank of India, Judge Pollack, Judge Pettine, and the Court of Appeals. At no time does Allied accept the slightest responsibility.

Allied has required five different courts, counting this Court, and two different judges in Rhode Island, to familiarize themselves with a complex case. The drain on the courts' resources has been enormous. Yet Allied wants to drain more of the courts' resources and, *mirabile dictu*, repeats its shopworn promise that it is prepared to go ahead with the case promptly.

And how that would prejudice Textron! The operative facts go back at least to 1964. Key Textron witnesses are dead

or gone (1st Cir. App. 36-39), including now C. William Miller, Textron's main witness. Sinha would testify knowing Textron would be hard put or unable to produce witnesses to refute him.

Discretionary dismissals for want of prosecution and non-compliance with court orders have been sustained in circumstances far less compelling than these.[16]

Conclusion.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

GEORGE M. VETTER, JR.,
Counsel for Respondent.

Of Counsel:
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2200 Industrial Bank Building,
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(401) 274-2000

Dated: November 15, 1978.

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[16] *See, e.g., National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976); *Link* v. *Wabash Railroad Co.*, 370 U.S. 626 (1962); *Zavala Santiago* v. *Gonzalez Rivera*, 553 F. 2d 710 (1st Cir. 1977); *Affanato* v. *Merrill Brothers*, 547 F. 2d 138 (1st Cir. 1977); *Pease* v. *Peters*, 550 F. 2d 698 (1st Cir. 1977); *Asociacion de Empleados del Instituto de Cultura Puertoriquena* v. *Rodriguez Morales*, 538 F. 2d 915 (1st Cir. 1976); *Spering* v. *Texas Butadiene & Chemical Corp.*, 434 F. 2d 677 (3d Cir. 1970), *cert. denied*, 404 U.S. 854 (1971); *Pearson* v. *Dennison*, 353 F. 2d 24 (9th Cir. 1965).

Appendix.

HIGGINS, CAVANAGH & COONEY
ATTORNEYS AT LAW
600 TURKS HEAD BUILDING
PROVIDENCE, R. I. 02903

June 9, 1977

The Honorable Raymond J. Pettine
United States District Court
for the District of Rhode Island
Federal Building
Providence, RI 02901

Re: Allied International Products, Ltd.
vs. Textron Industries, Inc.
No. 74-257

Dear Judge Pettine:

I have filed my entry of appearance as attorney for the plaintiff, Allied International Products, Ltd. Enclosed is a copy of plaintiff's letter to Attorney Norton I. Katz in New York, confirming their agreement terminating his services.

I feel that plaintiff has a meritorious claim for substantial damages. I also feel that due to various circumstances in this case, without any fault on the part of the plaintiff, there is a serious danger of a gross injustice if plaintiff is denied a trial on the merits.

Sincerely yours,

JOSEPH V. CAVANAGH

JVC/fg
Enclosure
cc — George M. Vetter, Jr., Esq.
— Peter L. Kennedy, Esq.
— Norton I. Katz, Esq.

RICH, KRINSLY, POSES, KATZ & LILLIENSTEIN, P.C.
99 PARK AVENUE · NEW YORK, N.Y. 10016
867-7200
CABLE ADDRESS: INTAVOCAT

June 13, 1977

The Honorable Raymond J. Pettine
United States District Court for the
District of Rhode Island
Federal Building
Providence, Rhode Island 02901

Re: Allied International Products, Ltd.
vs. Textron Industries, Inc.
No. 74-257

Dear Judge Pettine:

I am in receipt of a copy of a letter addressed to Your Honor from Joseph V. Cavanagh, Esq., dated June 9, 1977, which is described as "confirming their agreement terminating his services." For the record, our services have been terminated by the plaintiff and we have been instructed to take no further action, but that termination was unilateral and not the result of any agreement.

However, we confirm the fact of the termination and are submitting a stipulation and proposed order of withdrawal to the plaintiff through Mr. Cavanagh.

Respectfully yours,

Norton I. Katz

NIK/fl

cc: Peter L. Kennedy, Esq.
George M. Vetter, Jr., Esq.
Joseph V. Cavanagh, Esq.

Supreme Court, U. S.
FILED
NOV 24 1978
MICHAEL RODAK, JR., CLERK

No. 78-441

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

ALLIED INTERNATIONAL PRODUCTS, LTD.,
Petitioner,

v.

TEXTRON INDUSTRIES, INC.,
Respondent.

REPLY MEMORANDUM FOR THE PETITIONER

ERWIN N. GRISWOLD
Counsel for Petitioner

Of Counsel:
JONES, DAY, REAVIS & POGUE
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036

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IN THE

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Petitioner,

v.

TEXTRON INDUSTRIES, INC.,
Respondent.

REPLY MEMORANDUM FOR THE PETITIONER

I

The respondent cites a long chronology in its brief in opposition (pp. 2-17). But this simply confuses and beclouds the issue here. Most of the matters raised there are not before the Court at this time. There were delays, but the fault was by no means all on one side. Judge Day determined in May, 1975 that "the defendants have contributed significantly to said delayed prosecution." (1st Cir. App. 50.)

The question of fee payments by the petitioner was not an issue before Judge Pettine. The statements in the record about fee payments came from the defendant's counsel, or, improperly and incompletely, from the plaintiff's counsel. They were highly prejudicial, and they obviously affected Judge Pettine, for, in his order of June 13, 1977, he said that

petitioner's first counsel withdrew "apparently because they were never paid." And he referred to "Renewed difficulties regarding fee arrangements." (1st Cir. App. 139; *see also* 1st Cir. App. 145.)

Yet counsel *never* withdrew his appearance.[1] It remained his duty "to represent his client zealously." ABA Code of Professional Responsibility EC-71. That this was not done at the proceedings before Judge Pettine is apparent from a reading of the record relating to the events from October 14, 1976 through the order of March 22, 1977 (1st Cir. App. 52-72), and particularly the transcript of the hearing held on March 7, 1977. (1st Cir. App. 61-68.)

Any defaults were the defaults of counsel, who, using "breakdown of communications" (1st Cir. App. 59) as an euphemism for non-payment of fees, did not comply with the trial court's orders and failed to protect his client's interests. It may be that in many cases it is appropriate to hold the client responsible for his attorney's defaults. But this is a very unusual case, with the client on the other side of the world, and literally helpless to take *any* steps except through its duly admitted American attorney who had entered his appearance and assumed the responsibility to represent his client zealously. This is a default in the American system of delivering legal services, and justice is not well served by visiting the entire burden of the lawyer's default on the foreign client.

[1] 1st Cir. App. 118-130 does contain a motion to withdraw signed by Norton I. Katz, and dated April 6, 1977, more than two weeks *after* Judge Pettine's order of March 22, 1977. But this motion was *never* filed in the district court. It was in fact sent by Mr. Katz to counsel for the defendant, and appears in the record *only* as an exhibit to an affidavit, dated May 9, 1977, and filed by counsel for the *defendant* in the court of appeals.

In fact the services of Mr. Katz were terminated by the plaintiff, as shown by the exhibit attached to the brief in opposition. (Br. in Opp. 2a.)

II

The issue before Judge Pettine on March 7, 1977 arose on the petitioner's failure to comply with the court's pre-trial order of November 11, 1976 (1st Cir. App. 54), the motion to compel answers to interrogatories filed on January 19, 1977 (1st Cir. App. 56), and the motion to dismiss filed on January 25, 1977 (1st Cir. App. 58).

(a) Examination of the record makes it clear that the plaintiff *never* received the pre-trial order of November 11, 1976.[2] There was clearly default on the part of Allied's counsel in not sending this critical order, or in not making it promptly available when it was notified that Allied had not received it.

(b) When the hearing was held before Judge Pettine on March 7, 1977, *Mr. Katz did not appear at all.* Mr. Kennedy, of the Rhode Island bar, did appear at the hearing. He opened his statement by saying (1st Cir. App. 64):

> First off, I'd like to state to the court that I am here today representing Mr. Katz, and whatever interest he has in this matter. *I have not been engaged by Allied International. Like Mr. Katz I*

[2] The respondent says: "Allied's New York counsel says it sent the order to Allied in India and to Allied's collaborator in New York. Allied says it never received it." (Br. in Opp. 11, n. 8.) Neither Judge Pettine nor the court of appeals ever made a finding on this, largely because Judge Pettine was misled by a misstatement of *defendant's* counsel and by the default of the plaintiff's counsel. A reading of the letters appearing in the record makes it apparent that Allied was unaware of the content of the pretrial order and sought assiduously and unsuccessfully to obtain the information from its counsel in New York and in Providence. (1st Cir. App. 157, 158, 117, 164; Petition, p. 11). Whether the difficulty arose because the order was not in fact enclosed with the letter sent by Mr. Katz, or because it was mislaid in New Delhi is not material. The fact is that Allied was not aware of the content of the order, so advised its counsel, but was never sent the information over a period of three months.

> *am not being paid.* Also, I don't intend to represent Allied International, other than for the purpose of this motion to extend the time and work for Mr. Katz for whatever ends he may desire. [Emphasis supplied.]

The respondent's answer to this (Br. in Opp. 22) is: "Whatever Kennedy said, he represented Allied at the hearing and acted for it both before and after the March 7, 1977 hearing." The Court can judge how zealously this representation was conducted in the petitioner's interest. Mr. Kennedy himself injected the fee matter into the proceeding, thus in effect acting as a witness against his client, and the fee matter clearly affected Judge Pettine in his exercise of his discretion.

And this is the crux of the matter. Judge Pettine was exercising discretion. Discretion is a fragile flower, much affected by contamination in the atmosphere,[3] and this was peculiarly the situation in this case. The record here shows clearly that Judge Pettine was in fact affected in the *basic formulation* of his discretion by two matters, one relating to fees, which was irrelevant, and was repeatedly introduced by Allied's counsel, and the other a charge of lying, accepted by the Judge, which was introduced by respondent's counsel. This has been detailed in the Petition (pp. 13-26) and need not be repeated here.[4] It is true that these matters were again considered by Judge Pettine, but by that time the damage had been done.

[3]Compare the observation made long ago by Lord Penzance: "Under cover of the word 'discretion' a conclusion is apt to be formed upon a general impression of facts too numerous and minute to be perfectly brought together and weighed, and sometimes not perfectly proved; while the result is apt to be coloured with the general prejudices, favorable or otherwise, to the person whose conduct is under review, which the course of the evidence has evoked." *Morgan v. Morgan*, L.R. 1 P.&D. 644, 647 (1869).

[4]In the Petition, reference was made to the fact that counsel for the defendant is "well-known" to Judge Pettine. The brief in opposition says (p. 23): "Just what is Allied insinuating? Nothing less than that Judge Pettine decided the case out of partiality to defendant's counsel!"

Of course, no such insinuation is made. The fact that defendant's counsel is well known to Judge Pettine is relevant, because it was a basis on which Judge Pettine could rightly rely on his statements. Yet the statement about Allied's lying was simply wrong. And it clearly affected Judge Pettine's exercise of his discretion.

The brief in opposition (p. 23) speaks in high terms of Mr. Cavanagh. But Mr. Cavanagh did not enter his appearance until June 8, 1977 (1st Cir. App. 5), long after Judge Pettine had, for practical purposes, so far formulated his views that the die was cast.

On so important a matter as the dismissal of a lawsuit brought by a foreign plaintiff, with serious defaults by its American counsel, and without any real and effective representation of the plaintiff at the crucial hearing on March 11, 1977, the plaintiff was entitled to an exercise of discretion unaffected by irrelevant factors and erroneous statements by defendant's counsel. When that became impossible, it was an abuse of discretion and contrary to the requirements of due process to dismiss the plaintiff's lawsuit without any opportunity for a hearing on the merits.

CONCLUSION

In these circumstances, "The doom entered below seems altogether too final and definitive." *Lyford v. Carter*, 274 F.2d 815, 816 (2d Cir. 1960). The petition should be granted; the judgment should be reversed with directions to remand the case for a prompt trial on the merits.

Respectfully submitted,

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Counsel for Petitioner

Of Counsel:

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November, 1978